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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, RESPONDENT

BRIEF FOR THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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SEPTEMBER, 1946.

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OPINIONS BELOW

The opinion of the District Court (R. 365-371) is reported at 60 F. Supp. 1004. The opinion of the Sixth Circuit Court of Appeals (R. 378-382) is reported at 155 F. 2d 1016.

QUESTION PRESENTED

Whether persons in training for positions as porters, callers, messengers, stenographers and clerks (commonly called "posters") and as firemen, switchmen and brakemen (commonly called "cubs") are "employees" of the Railway during their training period within the meaning of the Fair Labor Standards Act of 1938, 29 U.S.C.A. 201 et seq.

The question just stated is the identical question which the Sixth Circuit Court of Appeals found to be presented (R. 380) as distinguished from the petitioner's statement of the "question presented" in his brief at page 3.

STATEMENT OF THE CASE

The statement of facts contained in petitioner's petition (PP-4-11) is not the "Findings of Facts" made by the District Court (R. 365-371, 60 F. Supp. 1004) which were fully concurred in by the Sixth Circuit Court of Appeals (R. 378-382). On the contrary, petitioner's statement of the facts is a statement of facts that he hoped the courts below would find, but didn't.

Because of the inadequate and partial statement of the case in petitioner's petition (PP 4-11), the respondent (hereinafter called respondent or "Railway") deems it material to the consideration of the question presented, to set forth its statement of the case rather than undertake to supply matters material to the consideration of the question presented by isolated additions to and corrections of petitioner's statement. For this purpose, except for the absence of record references, respondent might well rest with the "Findings of Fact" of the District Court (R. 365-371, 60 F. Supp. 1004) which were concurred in by the Sixth Circuit Court of Appeals (R. 378-382).

The facts as to "trainees" or "cubs" in training for positions as firemen, and switchmen in yard service.

Persons seeking employment for positions of firemen or switchmen in Yard Service must fill out a written application, have a physical examination and train or "cub" for a period before being eligible for employment (R. 25-26, 40, 79, 300). This practice is of long standing with the respondent Railway and with the other railroads throughout the country (R. 50, 80, 300).

The training or "cubbing" is necessary in order that the "cub" may familiarize himself with the yard, signals, location of switches, making-up and breaking-up of trains, uncoupling

cars, etc. (R. 32-33, 50, 52, 80-81), and for his own safety and the safety of others (R. 33, 80). He is practically helpless when he starts "cubbing" (R. 29) and he could never "get anywhere without it" (R. 36).

The period of his "cubbing" is usually about 6 to 10 days, depending upon the aptitude, ability, prior experience and industry of the individual (R. 29-30, 39, 42, 48). No particular period of "cubbing" is required (R. 58) and it is carried on in good faith (R. 58, 315). The trainee's day's cubbing is usually one shift of 8 hours. However, occasionally, a person who is anxious to get on the "extra board" as soon as possible, has cubbed as much as a shift and a half (12½ hours) in a day (R. 30, 45, 216). At page 5 of petitioner's petition it is said that "cubs" *frequently* work 12 to 16 hours a day. It appears from the entire record that only one trainee-switchman cubbed longer than 12½ hours on any day. He "cubbed" 16 hours on two different days (R. 186-187) but he did this voluntarily in order to qualify sooner (R. 196).

The trainee "cubs" with a regular crew of employees some of whom instruct him and show him how to perform the duties of the job he is trying to qualify for and let him under their immediate supervision actually perform manual activities in order to learn (R. 46-47, 54, 55, 56, 211, 215, 219, 220). He must cub on different shifts to learn the yards, switches, tracks, etc. (R. 29-30, 224-225). When he thinks he has cubbed sufficiently and when he is okayed by the men with whom he has "cubbed" the trainee is then ready to go on the "extra board," and not before (R. 40, 41, 48, 49-50).

Whatever the "cub" does in the course of his training is for his sole benefit (R. 55-56, 58-59, 209, 211, 220, 221, 301). Everything that he does is something that a regular employee is there to do and paid to do (R. 55, 56, 65, 82, 211-212, 220). The cub performs no beneficial service to the Railway. In fact, he is in the way and delays the work being performed (R. 29, 33,

54-55, 56-57, 82). The crew with whom he is "cubbing" had rather not have him (R. 56-57).

He comes and goes when he pleases (R. 57, 58, 94-95, 209, 221, 223). He has no duties and no responsibilities (R. 56, 82, 220, 301). He is subject to no rules or discipline applicable to "employees" (R. 57, 83, 97, 301). His presence as a "cub" is purely voluntary (R. 50).

The "cub" understands when he files his application that he must "cub" before becoming an "employee"; that he is not an "employee" while a "cub"; and that he is not an "employee" until after he completes his cubbing and gets on the "extra board" or "roster" of "employees" (R. 28-29, 40, 48, 49-50, 82, 219, 220, 312).

The application carries with it no obligation to employ the applicant (R. 48) and he is under no obligation to complete his "cubbing" (R. 39). He has no status as an "employee" and is not considered as an "employee" until after he completes his training and goes on the "extra board" or "roster" of "employees" (R. 49-50, 312). During such training period the Railway is under no obligation to employ and the trainee is under no obligation to accept employment (R. 50). He is entitled to no seniority rights while "cubbing." That starts after he completes his cubbing and gets on the "extra board" or "roster" of employees (R. 50, 59, 82). If he never gets on the "extra board" he never gets acquainted with "seniority" (R. 82).

The trainee's status is not touched by any contract or wage agreement between the Railway and its employees (R. 50), and he does not enjoy the regular fixed contractual wage scale until after he completes his "cubbing," gets on the "extra board" and goes to work (R. 50, 85-86) and he fully understands that before beginning his training (R. 50).

The railway brotherhoods, which the "cub" may join after becoming an employee, treat him as a "cub" in training and not as an "employee." They refer to his "cubbing" as a "pre-employment training period" (R. 85).

The facts as to "trainees" or "cubs" for positions as firemen and brakemen in road service.

Persons seeking employment for positions of firemen or brakemen in road service must fill out a written application, have a physical examination, go through a period of training (called "cubbing"), and pass a written examination before being eligible for employment (R. 79, 229, 235, 258, 280, 300, 302, 312). They are so advised when they fill out their application (R. 235, 258, 280). This practice is of long standing with the Railway and with the other railroads throughout the country (R. 50, 80, 300).

It is necessary that trainees undergo a "cubbing" period in order to become familiar with the road, stations, grades, side tracks, switch tracks, block signals, industry tracks, branch line connections, etc. (R. 80-81, 237, 300, 301, 302, 322, 336, 352) *and for their own safety and the safety of others* (R. 80, 82, 300, 302). As one witness stated, when a person starts cubbing "it is just like a blind man" (R. 231). There is no other way to qualify (R. 80-81, 279). "You have to take hold if you ever learn" as one of petitioner's witnesses put it (R. 279).

All witnesses introduced by the petitioner in reference to "cubbing" in road service were from Nashville, Tennessee (R. 226, 240, 259, 269, 273, 278), who "cubbed" on two divisions of the Railway System, e. g., the Chattanooga and the Nashville Divisions, covering a total road mileage of 323 miles (R. 236-237). The average "cubbing" period for position of brakeman was about three weeks (R. 240, 260, 271, 274) and thirty to thirty-five days for position of fireman (R. 227, 278, 351). Petitioner makes reference in his petition (P. 6) to one person who cubbed seven weeks for position as fireman. He should have stated that this is because the person cubbed on two divisions, cubbed 35 days, which enabled the person, upon becoming employed, to establish seniority on both divisions of the Railway (R. 92, 318). Trainees did not "cub" longer than necessary (R. 235, 315, 337, 353). *Not a single witness claimed that he got too much cubbing.*

Trainees usually "cubbed" about eight to twelve hours per day in road "cubbing." If they were "cubbing" on through trains the period was less than eight hours. If on locals the period did not exceed twelve hours, except occasionally when the train would be late on schedule (R. 231, 246, 253, 262, 263).

The trainee "cubs" with a regular crew of employees some of whom instruct him and show him how to perform the duties of the job for which he is qualifying and let him actually perform manual activities in order to learn (R. 81, 94, 232-233, 256, 258, 277, 279, 280-281, 352). One of petitioner's witnesses complained that some of the regular firemen would not let him do as much of the actual work as he wanted to do in order to learn (R. 237).

Whatever the "cub" does in the course of his training is for his sole benefit (R. 209, 211, 235, 238, 256, 281, 301, 352). Everything he does is something that a regular employee is there to do and paid to do (R. 82, 235, 238, 256, 258, 277, 281, 338). The cub performs no beneficial service to the Railway (R. 82, 94, 281, 336). If a train starts from Nashville, Tennessee, to Chattanooga, Tennessee, and the cub leaves the train somewhere en route, the train goes on just the same (R. 82, 337, 352). Only one of the group of witnesses introduced by the petitioner thought that his presence on the train as a "cub" was a benefit to the Railway (R. 245). Some thought they were a liability to the Railway while "cubbing" (R. 235, 352).

When the trainee begins his "cubbing" he is furnished a schedule which it is desired that he follow but he is not required to follow any schedule. He may "cub" at his pleasure. If he starts on a trip and decides to get off en route and go home or elsewhere, he is free to do so. He may "cub" a day and lay off for a while if he chooses. The whole thing is optional with him (R. 94-95, 272, 323, 336, 353, 355, 358). *Generally the "cubs" do not follow the schedule* (R. 323).

The main purpose in furnishing a "cub" a schedule which it is desired that he follow, is for the convenience of the "cub"; to avoid more than one "cub" being with a crew at the same time; to

be able to locate him in case of sickness in his family or other personal emergency; and to aid him in familiarizing himself with all parts of the road over which he is to make his runs after becoming an "employee" (R. 323).

The "cub" has no duty and no responsibility. These rest with the regular employees (R. 82, 237-238, 257, 281, 301, 336, 353). He is subject to no rules or discipline applicable to employees (83, 97, 301). He understands that he is not an "employee" at the same time that he is a "cub," and that he cannot become an "employee" until after he completes "cubbing" and that "employment" follows training, written examination and getting on the "extra board" (R. 79, 235, 258, 276, 280, 312, 356, 359).

The Railway has never considered a person an employee while "cubbing" (R. 82, 312). The trainee is under no obligation to complete his training and become an employee (R. 258, 312). Whether or not he qualifies is optional with him. *In fact, a pretty large percentage of the trainees quit before completing their cubbing* (R. 347). He is not entitled to seniority rights while "cubbing." Seniority is established when the trainee completes his "cubbing," passes a written examination and gets on the "extra board" of "employees." If he never gets on the "extra board" he never gets acquainted with "seniority" (R. 82).

The Brotherhood of Trainmen does not consider that a "cub" is an "employee." It refers to "cubbing" as a "pre-employment train. g period" and its contracts as to wages and working conditions do not embrace "cubs" (R. 50, 85-86).

The facts as to payments to "trainees" or "cubs" for positions as firemen, brakemen and switchmen both in yard service and in road service.

Prior to December 1, 1943, the Railway did not pay anything to trainees for the position of firemen, brakemen and switchmen (R. 20, 22-23) and trainees who "cubbed" prior to December 1, 1943, understood that they would receive no monetary reward for the period of their "cubbing" (R. 50, 182, 210-211, 219, 235, 258, 280, 319-320, 351).

In 1943 there was a National Committee composed of representatives of Labor Brotherhoods and Railroad Executives to consider, among other things, the question of recommending that the railroads of the country consider the policy of making voluntary payments to trainees during their "cubbing" period which the said joint committee referred to as "pre-employment training period" (R. 84-85).

Realizing that the war had drawn into the service a large toll of young men and single men, leaving mostly older men with families and dependents to qualify for positions of firemen, brakemen and switchmen, and that they would need subsistence money during their "pre-employment training period," the Railway adopted the recommendation of the National Committee and adopted the policy effective December 1, 1943, of making voluntary payments of $5.00 per day to trainees during their "cubbing" period (R. 42-43, 48-49, 75, 76, 83, 84, 297, 311, 320). Effective about 15 days later (December 15, 1943) the Management slightly changed the policy so as to provide that if a trainee quit before completing his "cubbing" he would not receive this expense payment of $5.00 per day (R. 76, 83, 298, 312, 313, 320). This policy continued until about January, 1945, when the Management reverted to the policy originally established December 1, 1943, of making these voluntary payments irrespective of whether or not the trainee completed his "cubbing" (R. 77, 78, 83, 299, 313, 321) and instructed that all persons be paid, who had not been currently paid five dollars a day since December 1, 1943, because they quit before completing their training, which was done (R. 77, 78, 83, 298-299, 313, 314, 322, 347). Of the 475 who had "cubbed" since December 1, 1943, 406 received the five dollars currently and the 69 who were not paid currently, because they failed to complete their training, were paid by vouchers issued by the Accounting Department (R. 347).

The reason the Management reverted to the original policy of paying five dollars a day to trainees, whether or not they completed their "cubbing," is that several trainees complained that they understood all along that they would receive this amount

regardless of whether they completed their training. The Management desired that they be satisfied and that a policy be established that would not be confusing and could not be misunderstood (R. 77, 83). The fact that this lawsuit was pending did not influence the policy or decision of the Management (R. 83).

The result of the changed policy and instructions above stated is that since December 1, 1943, all trainees have been paid five dollars per day during the period of their "cubbing" and records kept of the days and hours of their "cubbing" (R. 78, 299, 312, 322, 347).

The payment of $5.00 a day is purely a voluntary payment on the part of the Railway (R. 83-84, 95). It is not "wages," but the gift of expense payment (R. 43, 78, 311-312). It does not include any amount for overtime (R. 84). If it were "wages" the amount of the payment could not have been fixed solely by the Railway. On the contrary it would have been fixed by collective bargaining, mediation and arbitration (R. 85, 86). It is not a contractual wage and it does not follow the trainee into service as an employee (R. 85). When he becomes an employee he draws the regular contractual wage of "employees" which is greatly in excess of the expense payment of five dollars (R. 85-86). His status while "cubbing" is not reached by any wage agreement between the Brotherhood and the Railway (R. 50). The Brotherhood does not recognize the "cub" as an employee (R. 85-86).

In no instance is there either claim or evidence that the daily cubbing period of any of the trainees for positions of switchmen, brakemen and firemen averaged as much as, or more than 12½ hours, i. e., that the payment of $5.00 per day equalled less than 40c an hour.

The facts as to "trainees" or "posters" for positions as stenographers, clerks, messengers, callers and porters.

Persons in training to qualify for positions as stenographers, clerks, messengers, callers and porters are known in railroad parlance and generally referred to in the record as "posters" (R. 109).

Applicants for positions of clerk, stenographer, caller, messenger and porter are required to qualify by undergoing a period of training or "posting" (R. 149). Such training or "posting" is necessary in order that the trainee may learn the duties of the job applied for (R. 152, 153, 153-154, 155, 156) and in instances, such as callers and yard clerks whose duties call them into the yards among engines, trains and cars, the training period is necessary for the *safety* of the persons seeking such jobs (R. 155, 302, 303).

The trainees for either of these positions "posted" with a regular employee and learned by listening to and watching the employee and by doing some of the employee's work in order to learn it (R. 105, 115, 116, 117, 131, 146). The Trainees "posted" for their own benefit and did nothing that a regular employee was not there to do and paid to do (R. 116, 119, 133, 134, 135, 137, 173). They understood that they were not employees while posting, but were just there training and learning (R. 118-119, 142-143). They were free to post when they pleased and at their convenience (R. 114, 118, 128, 129, 139). Some held regular jobs elsewhere and "posted" irregularly at their convenience (R. 114). They came when they desired and left when they desired and were free to select their own hours (R. 118, 129, 139, 143). Such persons, while training, were of no benefit to the Railway. Their presence required the regular employee to stop and instruct. It slowed up the regular employee (R. 117, 118). *Not a single witness thought that he was beneficial in any way to the Railway while "posting."*

Persons applying for any of these positions were not required to post longer than necessary (R. 158). The average period of posting was about a week for position of clerk, about 5 or 6 days for position of stenographer, about 2 days for job of porter, about 1 to 3 days for job of caller and about 3 days for job of messenger (R. 151-156). The period of posting depends largely upon the ability, aptitude and industry of the individual (R. 153, 154-155, 156, 157).

Some of the applicants for position as clerk "posted" for some two or three different types of clerical positions so as to be more certain of employment later. For example, one applicant posted 5 or 6 days for position of train clerk, two or three days for position of yard clerk and a similar period for position of record clerk (R. 106, 111). Substantially the same is true of another applicant, except that this applicant "posted" for a longer period on account of the fact that he was less apt and much slower to learn (R. 132-135, 157-160). The same is true of still another person who claimed to have posted for a longer period than the average (R. 160-161). In only two or three isolated instances did any person train for position of clerk longer than about a week. They are referred to in petitioner's petition (p. 7). In that connection petitioner might have further stated that these isolated cases resulted from the person training for three different types of clerical jobs and the more important reason that the particular persons were unusually slow to learn (R. 106, 111, 132-135, 157-160).

Likewise, the instance referred to in petitioner's petition at page 7 as to one person training 24 hours a single day for a clerk's position (R. 139) is but a single isolated instance which in no way reflected the usual practice. Petitioner could have further pointed out that this particular person was not required to "train" or "post" for 24 hours. He did it voluntarily. He could have quit at any time (R. 143).

Again at page 9 of the petition the statement is made that the record shows that the chief clerk at Chattanooga testified that it sometimes took him a week to teach them [porters] how to use a broom, thereby leaving the impression that the Railway sometimes requires a cub-porter to train for a week with a broom before employing him. What the chief clerk actually said was: "I have got one boy now that has been there a week and he don't know how to use a broom" and that he is not still cubbing but is on duty (R. 152).

Further efforts to correct petitioner's statement of facts will not here be indulged in. Respondent relies upon the facts as

found by the courts below and not upon the facts as insisted upon by petitioner which were rejected by the courts below. (R. 365-371, 60 F. Supp. 1004; R. 378-382).

The facts about payments to "trainees" or "posters" during the period of their training.

Following the passage of the Fair Labor Standards Act in 1938, the Railway adopted the policy of complying with the Act *as if* it applied to "posters," because of the possibility that persons while training *might* perform some beneficial service while posting and it was seeking to avoid any possible violation (R. 89), although the judgment of its officers was that persons while "posting" are "posters" and not "employees." (R. 88).

About 1944 or 1942 the Assistant General Manager (now General Manager) issued instructions to the various Superintendents of the various Divisions throughout the Railway System to pay persons while "posting" an amount equal to the minimum provided by the Act and to keep records as provided by the Act (R. 86, 293, 310).

Prior to these instructions there had been no "posting" subsequent to the effective date of the Act, because business was off and regular employees were being laid off (R. 86, 311).

The instructions were received by the Superintendents who in turn delivered them to the proper subordinate officials for execution (R. 294, 311).

The policy and instructions above referred to were carried out throughout the entire Railway system, except at Chattanooga, Tennessee, and as to a single person at Fayetteville, Tennessee (R. 87, 101, 295, 296, 311), and long before the Management had any knowledge that the Administrator would undertake to apply the Act to "posters" (R. 86, 293, 310). Said policy and practice have remained in effect continuously since their adoption (R. 74, 88, 151, 162, 295, 311).

At Chattanooga, Tennessee, the Superintendent of the Chattanooga Division instructed his chief clerk at Cravens Yard in

Chattanooga to pay persons while "posting" and to keep records in accordance with the provisions of the Fair Labor Standards Act (R. 170, 294) and both the Superintendent and the Assistant General Manager thought the instructions were being carried out (R. 86-87, 294). The chief clerk failed to carry out the instructions through oversight in the rush of war business (R. 170).

As soon as the error at Chattanooga was brought to the attention of the Management in the fall of 1944, the error was corrected, and the practice changed to conform with instructions of long standing and with the Railway's system policy and practice elsewhere throughout its entire system (R. 87-88, 161, 295). Since the latter part of 1944 the Railway has been currently paying persons at Chattanooga (as elsewhere on the system) a minimum of 40 cents an hour during the period of their "posting" and keeping records of the days and hours of "posting" (R. 88, 161, 162, 172, 175-176, 295, 311, 348-349).

The Trial Court found and concluded as to "posters" that "the Company is now and for several years past has been complying with the Act as to them, and apparently intends in good faith to do so in the future" (R. 370, 60 F. Supp. 1004, 1007-1008). Not only is this finding supported by abundant evidence, but there is *no* evidence to contradict it.

ARGUMENT

Reasons for denying the Writ.

1. There is no conflict in the decisions of the Courts of Appeals or in any of the District Courts anywhere on the question here presented, even though the question here presented has been decided by four District Courts and three Circuit Courts of Appeals at the instance of a single person (the Administrator of the Wage and Hour Division, United States Department of Labor) in each case.

2. The petition presents no important question of law which should be settled by this Court.

3. The Sixth Circuit Court of Appeals has not decided a federal question in a way probably in conflict with applicable decisions of this court and its decision is obviously correct.

A.

No conflict in decisions below.

The Administrator first presented the question here presented to the District Court of the United States for the Southern District of Florida (Walling v. Jacksonville Terminal Company, 55 F. Supp. 302) which court decided the question adversely to the Administrator May 6, 1944. On appeal the Fifth Circuit Court of Appeals affirmed the decision of the Court below April 23, 1945 (148 F. 2d. 768).

While the Jacksonville Terminal case was pending and before decision by the Fifth Circuit the Administrator instituted the instant suit in the District Court at Nashville, Tennessee, which was decided June 18, 1945 (60 F. Supp. 1004), and later affirmed by the Sixth Circuit June 1, 1946 (R. 378-382).

Likewise, the Administrator filed suit against the Portland Terminal Company in the District Court of Maine, Southern Division (Walling vs. Portland Terminal Company, 61 F. Supp. 345) again presenting the same question here presented and said court decided that case adversely to the Administrator June 18,

1945, which decision was affirmed by the First Circuit Court of Appeals April 29, 1946 (155 F. 2d 215).

Still another suit was instituted by the Administrator against Norfolk Southern Railway Company in the District Court of the United States for the Eastern District of North Carolina (unreported) again presenting the same question here presented, which was decided against the Administrator July 9, 1946.

Thus it is to be seen that the Administrator has presented the question here presented to seven different Courts (4 District Courts and 3 Circuit Courts) and on similar facts in each case all of the seven courts have reached the same decision, hence there is no conflict in decisions for this court to decide.

B.

The petition presents no important question of law which should be settled by this Court.

At page 13 of the Administrator's petition it is said of the decisions of the courts below: "moreover, they open a widespread area of doubt as to the applicability of the Act to other industrial training programs." Respondent respectfully submits that exactly the opposite is true. The fact that seven different courts have reached the same decision on the question here presented closes any area of doubt as to the applicability of the Act anywhere where the question, if any, is substantially the same as the question here presented and already decided by seven courts.

Petitioner's argument that the question presented in this case is of grave importance almost vanishes when it is noticed that the very first suit he brought seeking to have trainees of the Jacksonville Terminal Company (55 F. Supp. 302, 148 F. 2d 768) brought within the scope of the Act, he did not choose to hasten a decision of the question by filing a petition for writ of certiorari in that case. That case was decided by the Fifth Circuit almost one year ahead of the decision by the Sixth Circuit in the instant case. If he considered that the question is of grave importance and should be decided by this court, he could have saved a lot of

valuable time by following through with the Jacksonville Terminal case instead of abandoning that case and prosecuting suits involving the same question in three other distinct circuits.

At page 13 of the Administrator's petition it is said: "The importance of this question is indicated by a National Industrial Conference Board survey of 473 companies with a combined employment of 626, 668, which revealed that four out of five companies had definite training programs. *Training for Industry*, National Industrial Conference Board (1937), pp. 1, 2, 20." It is significant to note that the survey referred to was in 1937 in a year before the Act was approved June 25, 1938. It is no easy task to understand the Administrator's suspicion that the uniform decisions of the courts below will open a widespread area of doubt among other industries unless writ of certiorari is granted in the instant case which does not involve the industrial training program of other industries. The decisions of the lower courts do not seem to have disturbed anyone to date, except the Administrator. Petitioner points in his petition to no instance of such disturbance. The record in this case shows none. Industry is not frightened by the decisions. Labor unions seem to be satisfied with them. They do not consider that these volunteer learners are "employees" (R. 50, 85-86). No alarm is sounded by "employees" and none by the "trainees."

In Walling vs. Norfolk Southern Railway Company (unreported), supra, the District Judge said:

"No complaint of the acts and omissions of the defendant concerning the matters involved in this controversy was made in any quarter prior to the filing of complaint in this case, and no complaint has come from any other quarter since such filing."

Everybody seems satisfied with the decisions below, except the Administrator. It is respectfully submitted that the old 1937 survey made by the National Industrial Conference Board before the Act was passed, belatedly dug up after the trial in the District Court presents no basis for the fears manifested by the Administrator.

C.

The decision of the Sixth Circuit Court of Appeals is obviously correct and it is not in conflict with applicable decisions of this Court.

At the outset and for the Court's convenience, respondent calls attention to the "Finding of Facts" of the courts below stated in the Circuit Court decision (R. 379-380) as follows:

"Upon the question whether such persons are trainees or employees, the court found the following facts;

" 'When a trainee enters upon his training, he does not regard himself as an employee, nor does the Company so regard him. He understands that he is under no obligation to become a regular employee when he finishes his training, nor is the Company under any obligation to so retain him. Whether or not he remains as an employee is entirely optional with him. During the training period the Company exercises no authority or control over his activities, nor over the manner in which they are performed. He is not subject to discipline as an employee. No orders are issued to him, although he is given a suggested schedule to follow, which authorizes him to join a certain crew at a designated time. He is at liberty to do so or not, at his election. If he is absent, such absence does not in the slightest affect the movement of trains, or other work, as the trainee does no independent work and assumes no responsibility. There is always a regular employee to perform the duties of the job, who is responsible for the proper performance of the duties being learned by the student, and who receives standard pay therefor under the labor contracts. Students are present on the job, solely for their own benefit and advantage, in order to qualify themselves for future employment. They are under no obligation to do any work whatever, nor even to report for duty, and when they do perform work it is not to serve the Company, but to enable them to learn the job. The regular paid employee is always there to do the work, and would do it but for the intervention of the student in his own interest. Thus the student performs no work for the benefit of the Company, nor in its interest. He simply accompanies a regular employee on the job, and from him and from the student's own practice, learns the duties of the job. The Company gains nothing from his presence as a student, other than the remote potential advantage of building up

a pool of trained persons who will be available as employees when needed. This advantage is diminished to the vanishing point by the fact that it is wholly optional with the trainee whether or not he enters the Company's employ when called.'

"Without going into detail, we conclude that these findings have ample support in the evidence. They are certainly not 'clearly erroneous' and we are bound by them. See Federal Rules of Civil Procedure, Rule 52 (28 USCA following 723c). We have heretofore consistently followed this rule. Hazeltine Corp. v. Crosley Corp., 130 Fed. (2d) 344 (C.C.A. 6). *There is indeed no special controversy over the facts.*"*

1. The facts as found by the District Court and concurred in by the Circuit Court will be accepted by this Court.

See:

Skidmore v. *Swift*, 323 U.S. 134, 137.
Armour & Co. v. *Wantock*, 323 U.S. 126, 134.

Under the Act the duty or power to find the facts does not rest with the Administrator (*Kerschbaum* v. *Walling*, 316 U.S. 517, 523).

2. Based upon the facts as found by the courts below the Sixth Circuit Court said (R. 380-381):

"Section 3 (c) of the Act defines 'employee' as an individual employed by an employer; and Sec. 3(g) defines the word 'employ,' to mean 'to suffer or permit' the trainees to work. See *Walling* v. *Sanders*, 136 Fed. (2d) 78, 81 (C.C.A. 6). Appellant's difficulty here is that the findings conclusively establish that appellee did not 'suffer or permit' the trainees to work *for it*. See *Walling* v. *Jacksonville Terminal Co., supra* (148 Fed. 2nd, at page 770). The fact that the trainees necessarily used the facilities of appellee during their training period does not carry an inference that they worked for appellee. *If trainees are to be considered as 'employees' then the long entertained concept of voluntary apprenticeship passes entirely away.* The Jacksonville case, upon its facts, is in all material aspects similar to the case in hand, and we are satisfied with the reasoning thereof. To say more would constitute surplusage." (Emphasis supplied).

*All italics ours unless otherwise indicated.

In holding that the "trainees" are not "employees," the district court's opinion (60 F. Supp. 1004) states at pages 1006-1007:

> "For the purpose of this Act, whether or not the relationship of employer and employee exists is to be determined upon the principles of contract. Tort cases relating to that relationship are inapplicable. In order that wages become due, to which the protection of this Act applies, there must be a contract of employment, either express or implied. It is indispensable to the existence of such a contract that the employee perform some service for the benefit of the employer, or in his interest, of which the payment of wages is the quid pro quo. The performance of such a service is here wholly lacking, as is all other indicia of employment, including the authority to direct and control the activities of the trainee. Thus during their training period these trainees act only for their own benefit and in their own interest. Their activities are wholly voluntary. No measurable benefit flows to the Company, for which the law would imply an obligation to pay. It is in this respect that this case fundamentally differs from *Walling* v. *American Needlecrafts*, 6 Cir., 139 F. 2d 60, relied upon by plaintiff. There the workers labored and produced for the benefit of the employer in circumstances in which the law will imply an obligation to pay them, even though their work was not performed under the direct supervision of the employer. Here, the trainee works, not for the Company, but for himself and produces nothing of benefit to the Company. The law therefore implies no obligation to pay him."

In the Jacksonville Terminal case, supra (148 F. 2nd 768), the Court in pointing out that the Fair Labor Standards Act must be applied in the light of "common sense" said at page 770:

> "To permit another to work in my shop in making or repairing something for himself, would not make him my employee. *The words 'suffer or permit to work' must be understood with common sense.* In the present case the Company did suffer the trainee to work on its premises and with its appliances, but the benefit immediately in view was to the trainee, that he might learn, might qualify himself for a job which he desired. While studying the rule book or observing the yards and the crews he was doing nothing to the benefit of the Company. When he was allowed to fire the engine, or throw

switches or transmit signals, it was for his instruction. The Company was not benefited, for it had present a man hired to do it who would have done it but for the presence and interference of the trainee."

If the Act is as broad as the Administrator contends then it completely obliterates every concept of voluntary apprenticeship which has been recognized generally in this country since the days of Plymouth Rock and Salem. If these "trainees" are "employees" as contended by petitioner "then the long entertained concept of voluntary apprenticeship passes entirely away" as pointed out by the Sixth Circuit (R. 381) and there is no longer any such thing as a "student", "cub", "learner" or "trainee" in industry as distinguished from an "employee."

3. If one has not hired another expressly nor suffered or permitted him to work *under circumstances where an obligation to pay him will be implied* they are not employer and employee under the Act.

Bowman v. *Pace*, 5 Cir., 119 F. 2d 858, definitely and directly involved the question of whether Bowman, the watchman plaintiff, was an employee of Pace, the wholesale grocer defendant, *as a watchman*. In holding that he was not an employee of Pace, the Court said at page 860:

> "If not, he cannot recover of that Company. It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law. If one has not hired another expressly, not suffered or permitted him to work *under circumstances where an obligation to pay him will be implied*, they are not employer and employee under the Act."

The italicized words make all the difference in the world. Were it not for this distinction the construction advocated by petitioner would in the words of the Court in *Walling* v. *Sanders* (136 F. 2d 78, 81) embrace "not only those who work for the employer but encompass all employed humanity." Any broader construction than indicated by the italicized words would render business men liable for the standard of wages not only of their

bona fide employees but also of independent contractors, employees of independent contractors, employees of strangers and mere volunteers; and it would render instructors liable to pay for the work of their pupils. It would make a housewife liable to the salesman of a vacuum cleaner if he comes to her home and she "suffers or permits" him to clean the living room rug as a part of his demonstration. A school which "suffers or permits" a student to practice and engage in football, which is hard work, would be liable for the standard of wages provided in the Act if petitioner's version be accepted. Such would be some of the absurd conclusions logically following from upholding the administrator's contention with respect to the meaning of Sec. 3(g) of the Act.

Further authority for the propositions that employment within the meaning of the Fair Labor Standards Act is premised upon a contract under which wages become due and that "suffer or permit to work" has reference only to work under circumstances involving wage liability is found in the case of ***Helena Glendale Ferry Co. v. Walling,*** Administrator (1942), 8 Cir., 132 F. 2d 616. In that case a man named Johnson owned most of the stock in the Ferry Company and also a plantation upon which he employed a foreman. In addition to his plantation duties, the foreman under Johnson's orders hauled coal and built road approaches for the ferry company. He was paid only by Johnson. Upon these facts the foreman was found to be Johnson's employee and to be not employed by the ferry company within the meaning of the Fair Labor Standards Act even though it suffered the foreman to do work for it. At page 620 the court said:

> "The Act defines an employee as 'an individual employed by an employer' and the word 'employ' as used in the Act includes 'to suffer or permit to work'. But since the obvious purpose of the Act is to establish minimum wages and maximum hours the words last quoted cannot be interpreted to include as an employee *one over whose hours of labor the employer has no control, and to whom the employer is under no obligation to pay wages, Bowman* v. *Pace Company, 5 Cir., 119 F.2d 858.* The evidence wholly fails to disclose any right in

the ferry company to require Marvin Johnson to work at any time nor any obligation upon the ferry company to pay him wages for the services which he occasionally renders it."

The case of *Schroepfer* v. *Abell Co.* (1942) D.C., D. Maryland, 48 F. Supp. 88, affirmed (1943), 4 Cir., 138 F. 2d 111, involved the question of whether rackmen who sold newspapers through vending machines for which they paid a rental to the newspaper company and which credited them with receipts turned in less the cost of the papers and plus a weekly allowance of $25 for use of car, were employees under the Act and it was held by Chestnut, J., that such rackmen were independent contractors and not employees. At page 94, the opinion reads:

"The statutory definitions of 'employer,' 'employee,' and 'employ' are in very general terms, and should be understood 'in their natural sense, and intended to describe the conventional relation of employer and employee.' *Robinson* v. *Baltimore & O. R. Co.*, 237 U.S. 84 . . . The definition is too general to expressly solve the particular problem. We must therefore look to the provisions of the act as a whole to determine whether such a relationship as existed between the parties to this case constituted the Schroepfers employees of the defendant and thus entitled to the benefits of the Act," and later, on the same page:

"The Act thus contemplates (a) a situation in which the employer, expressly or impliedly, agrees to pay a certain sum to the employee, and (b) has the control and determination of the hours of work by the employee, because by 29 U.S.C.A. 211(c) it is further provided that the employer must keep written records of the number of hours of work by the employees respectively."

This case is authority for the proposition that some sort of an employment contract must be made and form the basis of wage liability before the kind of employment relationship intended by the Act can exist. Such a contract need not be express, but the facts must not negative the existence of wage liability. It is interesting to compare the Schroepfer Case (supra) with *National Labor Relations Board* v. *Hearst* (1944), 322 U.S. 111, 64 S. Ct. 851, in which case the Supreme Court held that newsboys

were employees of a newspaper within the meaning of the Wagner Act. It is evident, first, that each case must be carefully analyzed on its own facts to support a legal conclusion as to whether a particular person stands in relation to another as independent contractors or employee, and second, that weight will be given to the purposes of the particular act and the subject regulated. Illustrative of this is the following language used by the Court at page 124:

> "Congress, on the one hand, was not thinking solely of the immediate technical relation of employer and employee. It had in mind at least some other persons than those standing in the proximate legal relation of employee to the particular employer involved in the labor dispute. It cannot be taken, however, that the purpose was to include all other persons who may perform service for another or was to ignore entirely legal classifications made for other purposes. Congress had in mind a wider field than the narrow, technical, legal relation of 'master and servant' as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others."

Newsboys other than temporary, casual or part time newsboys were found to be an integral part of the publisher's distribution system; they thought of themselves as employees and the newspaper company so regarded them; they worked for the newspaper company and performed services of value to it and their work was supervised by the publisher or its agents. Unquestionably their close economic relationship to the publisher, the permanence of the arrangement and the necessity of bargaining collectively with it, were factors which led the Court to find that they were employees under the Wagner Act. However, the case is readily distinguishable from the Schroepfer Case on many counts but partly because the subject with which the Fair Labor Standards Act is concerned is not collective bargaining but an employment relationship such that wage liabilities arise.

Comparison of these two cases illustrates not only the weight given to the subject regulated by the particular statute but the importance of thorough analysis of facts in each case and the al-

most controlling weight to be given to the findings of the trial judge or board in the first instance. These contentions are thoroughly vindicated by the action of the Supreme Court, which had on January 17, 1944, 321 U.S. 763, denied petition for writ of certiorari in the Schroepfer case, in refusing on May 22, 1944 (322 U.S. 770), to rehear petition for certiorari in that case brought by reason of the decision in the Hearst case handed down on April 24, 1944.

4. This court has held that to constitute work or employment under the Act here involved there must be physical or mental exertion "controlled or required by the employer, and pursued necessarily and primarily for the employer and his business" (Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590, 598; Jewell Ridge Corp. v. Local, 325 U.S. 161, 164-166). These cases answer petitioner's argument (p. 17 of the petition) that: "It is difficult to see how the Act's coverage can be made to depend on the existence of a 'primary or necessary benefit' to the employer as against the employee."

After asserting that the coverage of the Act cannot be made to depend on the existence of a "primary or necessary benefit" to the employer, the petitioner labors at length in his petition (pp. 17-19), without having any record references to cite, to point out a primary or necessary benefit to the employer of these trainees, and he gets no further than insinuations and accusations. On page 18 of the petition it is said: "It is difficult to understand the payment of four or five dollars a day to trainees during the war in the absence of any benefit to the respondent." These insinuations are taken care of by the opinion of the District Court (60 F. Supp. 1004) in its findings of fact at page 1007 as follows:

> "These payments were commenced in 1943, not because the Company considered that the trainees performed services of value, but pursuant to the recommendation of a joint committee of railway and labor executives, which committee referred to the payment as 'pre-employment' pay, and recommended that the payments be made because many of these trainees were married men with dependents who could not afford to undergo a period of training without some source of income. In mak-

ing the payments the Company regards them as incentive pay, not wages."

The above findings by the court have ample support in the record (R. 42-43, 48-49, 75, 76, 83, 84, 297, 311, 320). In fact there is no evidence to the contrary. On similar facts the First Circuit Court of Appeals reached the same decision in the Portland Terminal Co. case, supra, (155 F. 2d. 215, 218-219).

In the instant case it is perfectly obvious that the trainees, who come and go as they please; who are volunteers; who have no duty or responsibility; who are not subject to any rules of discipline applicable to employees; who understand that they are not 'employees' while 'trainees'; who train for their own benefit; who are of no benefit to the Railway while training; who are under no obligation to complete their training; who understand that the Railway is under no obligation to later employ them; who have no seniority; who are not included in any employment wage contracts; who are called students in a 'pre-employment training period' by organized labor; and whose time and presence are not controlled or required by the Railway, are not employees and their activities are neither *controlled or required* by the Railway, nor are they pursued *necessarily and primarily* for the benefit of the Railway and its business.

5. The cases relied upon by petitioner are far afield. The preponderance of cases cited by the Administrator are "tort" cases (Petition, p. 20). None of them involve the question here presented and none of them involve the question of who is or is not an employee for the purpose of applying the minimum wage and record keeping provisions of the Act. The tort cases were pressed upon the courts below. The District Court answered them (60 F. Supp, 1004) at pages 1006-1007 as follows:

> "For the purpose of this Act, whether or not the relationship of employer and employee exists is to be determined upon the principles of contract. Tort cases relating to that relationship are inapplicable. In order that wages become due, to which the protection of this Act applies, there must be a contract of employment, either express or implied."

Likewise, in the Jacksonville Terminal Case (148 F. 2d 768), supra, appellant pressed on that court numerous *tort cases* arising under the Federal Employers' Liability Act. In holding that such cases are "far afield," the court said at page 771:

> "Similarly the many cases cited as to the liability in tort for personal injuries suffered by *persons in training* are far afield. The varying duties and degrees of care to be observed for the safety of persons exposed to danger are not the *touchstones for this Act*, which relates *only* to the *wages to be paid employees*. We repeat what we said in *Bowman* v. *Pace*, Supra, (119 F. 2d 861), that 'wages are due according to principles of contract, not of tort'."

In Bowman v. Pace (119 F. 2d 858), supra, the court said at page 861:

> "But it is argued that Bowman was so far under the orders of the Pace Company as that Farsyth was not an independent contractor, citing especially 39 C. J., Master and Servant, p. 38; *Singer Mfg. Co.* v. *Rahn*, 132 U.S. 518, 10 S. Ct. 175, 33 L. Ed. 440, and *Western Express Co.* v. *Smeltzer*, 6 Cir., 88 F. 2d 94, 112 A.L.R. 74. These cases and those cited by C. J., relate to liability for personal injury to members of the public or to the workers, and not to a liability to pay wages. If one has full direction over the conduct of his business done by another, it is just to hold him responsible to any person who has been injured by a misconduct of the business; but it does not follow at all that the liability for wages is thereby shifted. Wages are due according to principles of contract, not of tort. See 2 Labatt, Master and Servant, 2d Ed., Secs. 665, 680."

The danger in using cases under one statute for the purpose of construing a wholly different statute is clearly stated in *National Labor Relations Board* v. *Hearst Publishing Company*, 322 U. S. 111, relied upon by petitioner, wherein the opinion states at page 122:

> "It is enough to point out that, with reference to an identical problem, results may be contrary over a very considerable region of doubt in applying the distinction, depending upon the state or jurisdiction where the determination is made; *and that within a single jurisdiction a person who, for instance,*

is held to be an 'independent contractor' for the purpose of imposing vicarious liability in tort may be an 'employee' for the purposes of particular legislation, such as unemployment compensation. See, e.g., *Globe Grain & Milling Co. v. Industrial Comm'n,* 98 Utah, 36, 91 P. 2d 512. In short, the assumed simplicity and uniformity, resulting from application of 'common-law standards,' does not exist."

We believe that the cases, already cited under this heading fully refute appellant's argument that *tort cases* are controlling, or even useful, in determining whether or not a "trainee" is an "employee" to whom "wages" are due under the Fair Labor Standards Act, a wholly different type of statute dealing with a wholly different problem.

Next petitioner relies upon *Tennessee Coal and Iron R. Co.* v. *Muscoda Local,* 321 U.S. 590 (Petition, p. 18-19). That case did not involve the question here presented. The relationship was admitted and the contest was as to what constituted working hours. The decision was finally rested on the particular findings of fact. It received consideration in the Jacksonville Terminal case, supra, (148 F. 2d 768, 771) and was distinguished and held inapplicable to the question here presented.

The particular facts of that case were so far different to the facts in the instant case that similarity is not to be found. There the trips were under the strict control and supervision of the company. Miners were not permitted to walk rather than ride. Regular schedules were fixed; loading and unloading were supervised; the speed of the trips was regulated; and the conduct of the miners during the ride was prescribed. The miners carried most of the equipment with which they worked, including fifty-pound sacks of dynamite, dynamite caps, gallon cans of oil, etc., to and from the mine surface and the work surface daily. Frequently the miners were required to stop between the mine surface and work surface and perform work for the company. This travel was compulsory and at all times under the strict control and supervision of the company. Admittedly they were employees, and the only question was in computing working time. None of the facts appearing in the Muscoda case, appear in the instant case. Indeed,

the facts are exactly to the contrary. Here respondent exercises no control over the trainee. He comes and goes when he pleases and however he pleases. No control is exercised over his activities. Whatever he does is for his sole benefit and purely optional with him. He has no duties or responsibilities and is subject to no rules or discipline applicable to employees. His time is his own. No two cases could be more different than the Muscoda case and the case here presented.

Jewell Ridge Coal Corp. v. *Local*, 325 U.S. 161, is as far afield as the Muscoda case and relied upon by petitioner (p. 19), for the same reasons. Likewise, *Anderson* v. *Mt. Clemens Pottery Co.* cited in the petition (p. 19), 326 U.S. 706, 149 F. 2d 461, does not deal with the question here presented. The same is true of *Armour & Co.* v. *Wantock*, 323 U.S. 126, cited by petitioner (p. 18).

Finally, petitioner cites *National Labor Relations Board* v. *Hearst*, 322 U.S. 111 (Petition, p. 21), involving the question whether "newsboys" distributing papers on the streets were entitled to "collective bargaining" under the provisions of the National Labor Relations Act. The Fair Labor Standards Act was not involved. In sustaining the Board finding that for the purpose of collective bargaining they were employees under the National Labor Relations Act, the court said at pages 131-132:

> "In this case the Board found that the designated newsboys work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers, who dictate their buying and selling prices, fix their markets and control their supply of papers. Their hours of work and their efforts on the job are supervised and to some extent prescribed by the publishers or their agents. Much of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publisher's benefit. Stating that 'the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act.' The Board concluded

that the newsboys are employees. The record sustains the Board's findings and there is ample basis in the law for its conclusion."

Again respondent insists that plainly the Hearst case bears no similarity to the case here for consideration. The facts are entirely different and the two cases arise under entirely different statutes setting up different remedies and covering different fields. Here the record sustains the courts' findings that trainees are not employees and there is ample basis in law for their conclusion.

The Hearst case received consideration in the Jacksonville Terminal case, 148 F. 2d 768, supra, wherein the court held it had no application (page 771).

We respectfully submit that none of the cases relied upon by appellant support his contentions in the instant case and all of them are far afield.

Section 14 of the Act is applicable only when learners are employed.

Section 14 of the Act does not *employ* learners, apprentices, messengers and persons otherwise handicapped. It only sets up machinery by which the employer *may* employ such persons at subminimum wages. The entire Section 14 deals with the *employment* of such persons—not to the conversion, as by magic, of volunteer trainees, training for their own benefit as students do in schools and colleges, into employees by legislative fiat, thereby making them employees instead of trainees, to their surprise as well as to the surprise of the public, by obliterating every traditional concept of employer and employee relationship.

The fact that provision for the *employment* of learners, apprentices and messengers was made in the same section which provided for the *employment* of "individuals whose earning capacity is impaired by age or physical or mental deficiency or injury" is further evidence (almost conclusive) that Congress made provisions for the *employment* of such persons at sub-

minimum wages and did not provide that volunteer trainees are *ipso facto* employees.

Judge Sibley, in *Walling* v. *Jacksonville Terminal Co.* (148 F. 2d 768) disposed of the Administrator's contention at page 770 thus:

> "And it is urged that Section 14 of the Act condemns this training plan unless under a special certificate and with wages specially fixed by the Administrator for learners. We do not construe Section 14 as aimed at curtailment of teaching the industrial arts, but rather at helping learners and other handicapped persons who could not command for their services the full wages fixed by the Act, to get them employment at less wages rather than no employment at all. The section lays a duty on the Administrator to provide for such persons. But its provisions apply only to the 'employment' of learners and the 'employment' of handicapped persons. If any person is willing to use such employees in his business, that is, to employ them, he must obtain a certificate and a lower wage fixed by the Administrator in order to escape the demands of the Act. But if he is not *employing* learners, but is in good faith endeavoring merely to *teach* them, the section does not apply for no wages at all are due." (Emphasis by the Court.)

At the end of his opinion in *Walling* v. *The Nashville, Chattanooga & St. Louis Railway* (60 F. Supp. 1004), Judge Strum says:

> "Nor are these trainees 'learners' as contemplated by the Act. A 'learner' is an employee who labors in the interest and for the benefit of his employer, and who produces something, or performs a service in the employer's interest, but due to inexperience or some other handicap the product of his labor is inferior to that of an experienced worker. The point of cleavage is that the 'learner', though his product be inferior or limited, is nevertheless working for the benefit of his employer and contributing to the employer's interest as far as the learner's capabilities permit, while the trainees here involved are working solely for themselves. The Company gains no measurable benefit from their activities."

Legislative History of the Act.

At the outset, respondent respectfully asserts that the statement attributed to Senator Black on the floor of the Senate referred to by the Administrator in his petition (pp. 13-14) that the definition of employment contained in the Act is "the broadest definition that has ever been included in any one Act," is definitely *over-worked*. What Senator Black did say was as follows, and in a wholly different connection: The question before the Senate was whether producers and packers of fresh fruits and vegetables should be included or excluded from the operation of the Act. In response to a question from Senator Copeland, Senator Black said:

> "The committee after careful consideration reached the conclusion that the definition of *employment* as given in paragraph (7) of Section 2 and which is the broadest definition that has ever been included in any one Act, was sufficient to include every genuine *bona fide* farming activity." (81 Cong. Rec. 7657 [1937]).

There is nothing in Senator Black's statement to indicate that he, or other members of the Senate, thought the definition broad enough to abolish volunteer trainees and by mere definition convert *ipso facto* "trainees" into "employees" thereby obliterating every indicia of employer and employee relationship so commonly used and so well understood for so long in this country.

It is doubtful if any sponsor of the bill had in mind any such transition from the traditional concept of employer and employee relationship at the time the bill was debated (1937) or approved (June 25, 1938) at which times the problem in this country was unemployment—not employment. There were then too many employees for the jobs available. Employees were being laid off (R. 86, 311) and it is difficult to imagine that, in these circumstances, Congress was undertaking by some sort of tricky definition to wipe out the well recognized conception of the legal relation of employer and employee by general, obscure and ambiguous language in an Act drawn otherwise with precision, clarity and definitiveness.

Since Senator Black's statement concerning the definition of employment is pressed by the Administrator, the respondent calls attention to his opening statement on the floor of the Senate. In opening the discussion of the bill generally, Senator Black said (81 Cong. Rec. 7648):

> "The general purpose of the bill, legislatively speaking, is a three-fold one.
>
> "It provides a method of obtaining the objective of minimum wages and maximum work hours * * *
>
> "There is one provision of the bill which * * * would authorize action in connection with those businesses and industries that are seriously competing with and have a substantial effect upon the flow of interstate commerce.
>
> "The third objective of the bill is to prohibit the transportation in interstate commerce of goods which are produced by the work of children."

There is nothing in the Finding and Declaration of Policy Sec. 2(a), (b) of the Act to indicate an intention by Congress to convert a "trainee" into an "employee", regardless of the facts of the relationship. We do not think the court will impute such an absurdity to Congress, as to hold that by the language and definitions in the Act there was any intention on its part to attempt to make an employee out of the trainee whom neither the trainee nor any one else had ever considered to be an employee, and who had none of the attributes of an employee as every one but the Administrator had always understood the term.

The legislative history of the Act was considered by the District Judge in *Walling* v. *Jacksonville Terminal Co.*, (55 F. Supp. 302) wherein the court said at page 304:

> "There is nothing in the legislative history of the Fair Labor Standards Act to show congressional intent to cover the trainees under the Act. On the contrary, the legislative history shows that Congress intended a wage and hour law for the benefit of underpaid and overworked persons who are in fact employees, and did not intend the law to transform into employees persons who had never been and are not today such employees."

In the case (148 F. 2d 768) the Circuit Court of Appeals said at page 770:

> "The trainees are not child-laborers, nor economically oppressed persons, nor in danger of injury by sub-standard living during the short period of training. The regular employees have all been trainees, and are now members of the powerful unions of railroad men, and some of the trainees with railroad experience no doubt are members too. These unions recognize the trainee's status and their contracts with the Company provide for the acceptance of them as employees. No abuse sought to be remedied by the Fair Labor Standards Act appears. We see no occasion to give an unreasonable interpretation to its words to upset this practice, *apparently satisfactory to all concerned.*"

In *Walling* v. *American Needlecrafts*, 139 F. 2d 60, this court said at page 64:

> "It is apparent from the debates that the purpose of the Congress was not to open the door to the return of the sweatshop system of unpleasant memory."

No "sweatshop system" is involved in the case now before the Court.

In *Walling* v. *Portland Terminal Co.*, Supra (155 F. 2d 215), the Court said at page 218:

> "There is no question but what this statute should be liberally construed for it is remedial and humanitarian legislation. Fleming v. Palmer, 1 Cir., 1941, 123 F. 2d 749, 762, certiorari denied 316 U.S. 662, 62 S. Ct. 942, 86 L. Ed. 1739. And the definition of employees is certainly a very comprehensive definition. United States v. Rosenwasser, 1945, 323 U.S. 360, 362, 65 S. Ct. 295. But we do not believe that Congress intended to give to the term 'employee' the expansive scope that a literal construction of the words 'suffer or permit to work' would compel. We cannot infer that Congress intended the absurdities that such a construction would breed."

In *Jewell Ridge Corp.* v. *Local*, 325 U.S. 161, this Court pretty clearly stated that the Act deals with wages and hours only of persons actually *employed*. The Court repeated its language

from the Tennessee Coal case (321 U.S. 590, 602) as follows at page 167;

> "'The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an *employee's* time while compensating him only for a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by *employees* covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive *employees* of their statutory rights'." (Emphasis supplied.)

In the same case the dissenting opinion states at page 176:

> "'It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-working-hour industrial workers, who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage.' (Senate Report No. 884, 75th Cong. 1st Sess., pp. 3-4)."

Finally it is said in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, it is said at page 137:

> "The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was."

It is respectfully submitted that the facts in the instant case clearly show that mere "trainees" are not "employees."

(1) The training is necessary that trainee may learn the duties of the job applied for and how to protect himself and others (R. 32-33, 50, 52, 80, 81, 152, 153-154, 155, 156, 237, 300, 301, 302, 322, 352).

(2) He trains for his own benefit and does nothing that a regular employee is not there to do and paid to do (R. 55-56, 58-59, 116, 119, 133, 134, 135, 137, 173, 209, 211, 215, 219, 220, 235, 238, 256, 281, 352).

(3) While training he is of no benefit to the Railway (R. 29, 33, 54-55, 56-57, 82, 94, 117, 118, 235, 281, 336, 337, 352).

(4) He comes and goes at will (R. 57, 58, 94-95, 114, 118, 129, 139, 143, 209, 221, 223, 272, 323, 336, 353-355, 358).

(5) Whether he trains at all is optional with him. He is purely a volunteer (R. 50).

(6) He understands that he is not an employee while training (R. 28-29, 40, 48, 49-50, 79, 82, 118-119, 142-143, 219, 220, 235, 258, 276, 280, 312, 356, 359).

(7) The respondent has never considered the "trainee" as an "employee" (R. 82, 312).

(8) He is under no obligation to complete his training and become an employee (R. 39, 358, 312) and the Railway is under no obligation to employ him (R. 48, 50).

(9) He is given no seniority rights while a trainee (R. 50, 59, 82).

(10) Labor organizations treat him as a "trainee" and not as an "employee." They refer to his training as "pre-employment training period." He is not included in their contracts (R. 50, 85-86).

(11) The trainee has no duty or responsibility. That rests with the regular paid employee (R. 56, 82, 220, 301).

(12) He is not subject to any rules or discipline applicable to "employees" (R. 57, 83, 97, 301).

(13) The payment of five dollars a day to the "cubs" is not "wages." It is a gift of expense money and purely a voluntary payment made by respondent during the "pre-employment training period" (R. 42-43, 48-49, 75, 76, 78, 83, 297, 311, 320), as found by the learned trial judge (R. 369).

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for Writs of Certiorari should be denied.

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